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80-5213

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1979

NO._____

R. KEITH PIKE, ET AL.,

~~Plaintiffs~~-Appellees,

vs.

LYLE H. PRENZLER,

~~Defendant~~-Appellant,

VERA KAMRATH, ET AL.,

~~Cross-Defendants~~-Appellees.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS RULE 53

LYLE H. PRENZLER, hereby motions to proceed in Forma Pauperis and supports said motion under 28 U.S.C. 1915, especially 1915(d) for appointment of counsel to aid in procedural process, by attached affidavit.

Dated: June 30, 1980

LYLE H. PRENZLER PRO SE

715 East Chapman Avenue
Orange, California 92666
714 639 1701

80-5213

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO._____

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LYLE H. PRENZLER, Appellant,

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Appellees

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A F F I D A V I T Rule 53

IN SUPPORT OF MOTION FORMA PAUPERIS

STATE CALIFORNIA)
) SS.
COUNTY OF ORANGE)

I. Lyle H. Prenzler, being duly sworn, depose and say:

I am the appellant in the above entitled cause, and support my application for leave to proceed without being required to prepay costs or fees, state:

1. I am a pauper, in part, because of the action herein, and I need appointment of counsel to support the procedural requirements of said appeal.

2. I believe I am entitled to redress;

3. The nature of the cause, in briefis a denial of removal, on the basis of 28 U.S.C. 1441(b) and 1447(d) for lack of original jurisdiction of the Federal Courts, which ruling is ambiguous and original jurisdiction is in this Court and has been, under Fede al Interpleader Act and 28 U.S.C. 2361 et al., and denial of equal protection of the laws under color state statute and repugnancy to U.S. Constitution 28 U.S.C. 1343, 42 U.S.C. 1983 and 1985, and involves falsity of service of processs by affidavit in state of Arizona and Pennsylvania.

Dated: July 28, 1980

LYLE H. PRENZLER

MY COMMISSSION EXPIRES 4-5-81

Dolores Girdlestone
NOTARY PUBLIC

OFFICIAL SEAL
DOLORES GIRDLESTONE
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
ORANGE COUNTY
My Commission Expires April 5, 1981

80-5218

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No._____

R. KEITH PIKE, et al.,

Plaintiffs, Appellees,

vs.

LYLE H. PRENZLER,

Defendant, Appellant.

VERA KAMRATH, et al.,

Cross-Defendants, Appellees.

JURISDICTIONAL STATEMENT

RULE 15

OPINIONS BELOW

Appellant, Lyle H. Prenzler, was sued on a sister money-judgment, Cal.Cod.Civ.Proc. 1710.10-1710.65 for deficiency on real property in Arizona in July 1978, while this judgment was void and voidable, and on denial of cross-complaint to include the indispensable party of the broker on same real property for lack of personal jurisdiction for lack of service of summons with complaint pursuant to Cal.Cod.Civ.Proc. 418.10, 413.10, 415.10 this case was petitioned for removal to the District Court of Central California on September 18, 1978; for denial of equal protection of the laws under color of state [illegible] statute and repugnant to laws, statutes and Constitution of the United States by a party of co-conspirators as 28 U.S.C. 1343, 42 U.S.C. 1983, 1985 and as an interpleading action under 28 U.S.C. 2361, 1397, 1335, and Fed.R.Civ.P. and Federal Rules of Civil Procedure 22(1), both original jurisdiction of district court.(Appended 1&2) On November 20, 1978, the honorable Robert M. Takasugi, judge presiding, U.S. District Court, Central District California Ordered remand to Superior Court of the State of California pursuant to 28 U.S.C. 1441(b) and 1447 (c).(Appended 3) Oral Order was made for reason that the District

Court was a court of "limited jurisdiction and this was not an cause in which it had original jurisdiction" even though such was pleaded as interpleader and denial of equal protection as above. 28 USC 1441(b) The Order was appealed timely to Ninth Circuit and dismissed for "lack of jurisdiction under 28 U.S.C. 1447(d), as not reviewable on appeal".(Appended 4) This appeal is from the final order and denial of rehearing dated April 25, 1980. (Appended 5). No other official or unofficial reports. Notice Appeal April 28, 1980(App6).

JURISDICTION

This appeal involves the original jurisdiction of the federal courts in interpleader actions and actions for conspiracy to deny equal protection of the laws as above referred to in 28 U.S.C. 2361 and 1343et al., for diversity of citizenship in 28 U.S.C. 1332; 1441(c) 28 U.S.C. 1254(2) and for reliance by appellant on state statute Cal. Cod. of Civ. Proc. 426.10-426.60 which is herein held by the court of appeals to be invalid as repugnant to the Constitution, and in effect denying a cross-complaint and redress by appellant in all and any jurisdictions and thereby denied due process and open hearing as in Amendment I,V,XIV, which by the seconding of denial of jurisdiction in federal courts denial of equal civil rights as in 28 U.S.C. 1443 and no trial on the issues with judgment on deficiency judgment,,as above, awarded, and denial of consolidation of what is in effect a multi-district litigation. (Appended Cal. Cod. Civ.Proc. 426.10-426.60). The federal issues are substantial for denial of trial on the merits and for denial of hearing on appeal under 28 U.S.C. 1447(d) wherein the denial of equal civil rights of this citizen appellant of the United States wherein appellent in that jurisdiction as in 28 U.S.C. 1443(1,2), 1441(a, b) as hereinabove. Venue is confirmed under 28 U.S.C. 1397 and 1391(b), 4 Service Process 22/1 etc as only in this district:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside or in which the claim arose." 28 U.S.C. 1391(b)

The date of the judgment of the Court of Appeal for the Ninth Circuit of February 19, 1980,entered on February 25, 1980, and denial

for rehearing of April 25, 1980 and notice of appeal of April 28, 1980 filed April 30, 1980, Court of Appeals for the Ninth Circuit of the United States.

The statutory provision believed to confer on this court jurisdiction of this appeal is Title 28 U.S.C. paragraph 1254(2).

The cases believed to sustain the jurisdiction are:

1. Georgia Savings Bank & Trust Co. v. Sims 321 F.Supp. 307
2. Halcomb v. Aetna Life Ins. Co., 283 F2d 75
3. Williams v. Gilmore (1942) 51 CA2d 684 125 P2d 539
4. Marshall v. Sawyer (1962) CA9 Nev 301 F2d 639
5. White v. Matthews (1976)DC,SD 420 FSupp 882
6. Carrasco v. Klein (1974) DC NY 381 F Supp 782
7. Lesnik v Public Indus. Corp. 144 F2d 968

QUESTIONS PRESENTED

1. Whether the trial court had original jurisdiction?
2. Whether under 28 U.S.C. 1441(h), this is an action founded on a claim or right arising under the Constitution or laws of the United States and therefore an original jurisdiction, and contrary to the Memorandum of Points and Authorities to Remand filed by appellees which cites the portion of 28 U.S.C. 1441(b) based upon diversity of citizenship and defendant and cross-complainant is a citizen of state where action is brought?
3. Whether denial of appeal under 28 U.S.C. 1447(d) is a denial of equal protection and repugnant to U.S. Constitution?
4. Whether denial of appeal under 28 U.S.C. 1447(d) in a removal under 28 U.S.C. 1443 affirmatively pleaded for denial and failure to enforce a right to redress and trial pursuant to Cal.Cod.Civ.Proc. 426.10-426.60 and therefore denial of equal protection of laws as in 28 U.S.C. 1343, et al., and a federal question for same deny under color state statute and repugnant to Constitution and laws United States is reviewable by appeal or otherwise; and affidavit of Service false Ariz & Pa. 14a1a.b
5. Whether denial of inunctive relief Federal Rules of Civil Procedure, Rule 8 and 65 and consolidation and interpleader Rule 24 Rule 33

has irrepar bly damaged appellant and this appeal is only redress as papers requesting injunctive relief have not been ruled on by the trial court?

6. Whether there is in fact venue in this trial court District as ancillary jurisdiction, plaintiff having brought action in this district?

7. Whether denial of jurisdiction in both federal and state courts effectively prevents appellant from any redress and equal protection of laws: all other trials on same liabilities have been denied hearing and jurisdiction?

8. Whether transfer to multi-district panel pursuant to Title 28 Para. 1407 should not be ordered by this court?

STATEMENT OF THE CASE

Has been stated concisely under heading Opinions Below, hereinabove. In addition, the appellant has been denied filing of appeals, accounting for moneys in filing cases and service of summon by U.S. Marshal, to the denial of any favorable judgment in this and all ancillary actions; denial of notification, appearances and representation.

REASONS QUESTIONS PRESENTED ARE SUBSTANTIAL

This claim or right arises under the Constitution, treaties, laws of the United States and the district court has original jurisdiction and therefore removable without regard to citizenship or residence of the parties; in this instance by the defendant, to the district court for the district embracing the place wherein it is pending, who has been denied or cannot enforce in the courts of State of California a right under any law providing for equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; and for any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. This case has not been removed improvidently and the trial court has and had jurisdiction as does this Court and the appeals court. Subject matter jurisdiction is res judicata in this trial court and appellant is entitled to claim equal protection of the laws as in the Four-

teenth Amendment especially as to venue; and by denial of persona jurisdiction of appellees; such Constitutional rights are denied; appellant having been caused to submit to persona jurisdiction in Arizona, over objections as 28 U.S.C. 1404, 1406. Service Process is statutorily permitted under cited Statutes.

ABUSE OF DISCRETION BY ACTION

A preliminary injunction requested pursuant to Federal Rules of Civil Procedure Rule 65 was filed on October 18, 1978 September 28 1978 and has never been answered or heard by the Trial Court; citing 28 U.S.C. 1441 (a) and requesting consolidation of the multiple actions for same liabilities to decrease possibility that one adverse judgment would forever defeat possibility of appellant to receive redress and equal protection of the laws, and United States Constitution Amendment XIV;

"The States prohibited from abridging privileges or immunities of citizens of the United States or depriving any person of due process or equal protection under the law"

and citing the purpose of jurisdictional grants to Federal Court in suits between citizens of different states was to avoid discrimination against non-residents. Szantay v. Beech Aircraft Corp. (1965) 349 F 2d 60. The trial court and appellate court have erred of law by denying injunction, amendment or vacating and irreparable damage has occurred to appellant thereby and this is the appellant's only remedy at law. These and other constitutional challenges raised by this appeal are substantial and important to all citizens affected by such statutes--present and future. For the reasons given above, the que tions raised are substantial and require a consideration of this case. The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions relied on and cases cited, above, to sustain the jurisdiction.

CONCLUSIONS

For all these reasons this case should be reviewed by this Court on its merits.

Respectfully submitted,

May 31, 1980

Lyle H. Prenzler
715 East Chapman Avenue
Orange, California 92666
(714) 639 1701

In Propria Persona
In Forma Pauperis

Bretz and Hennigan
124 Lasky Drive
Beverly Hills, California 90212
(213) 271-6201

Attorneys for Cross Defendant
Homer J. Reed

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

R. KEITH PIKE AND JOSEPHINE PIKE KARL MENATH and MARGUERITE MENARTH et al., Plaintiffs, LYLE H. PRENZLER, Defendant.	CASE No. 29-20-61 NOTICE OF RULING
LYLE H. PRENZLER, Cross Complainant v. HOMER J. REED; FRED KAMRATH; VERA KAMRATH; YUMA REALTY; R. KEITH PIKE; JOSEPHINE PIKE; KARL MENATH; MARGUERITE MENATH; Cross Defendants.	

Apr '

PLEASE TAKE NOTICE that on Monday, August 28, 1978, following hearing, the Court granted defendant Fred W. Kamrath's motion to quash service of process and his motion to dismiss for lack of personal jurisdiction. Similarly, following argument, the Court granted defendant Homer Reed's motion to quash service

of process and his motion to dismiss for lack of personal jurisdiction.

The Court noted that this dismissal was not on the merits, and would not prejudice Dr. Prenzler's ability to proceed in a proper forum.

Dated: September 12, 1978.

Respectfully submitted,

BRETZ & HENNIGAN

By _____
J. Michael Hennigan
Attorneys for Cross-defendant
Homer J. Reed

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

☐ Assigned from Dept. No. _____ Judge LLOYD E. BLANPIED, JR.

Clerk J. Jones Reporter Marilyn Seward Dept. 14 Date 9-15-78

Title PIKE VS PRENZLER Case No. 29-20-61

ATTORNEY(S)	*FOR**		ATTORNEY(S)	*FOR**	
1. Lyle Prenzler, pro per	D		4.		
2. MARK RAYNES	B		5.		
3.			6.		

*A = Petitioner; B = Plaintiff; C = Respondent; D = Defendant; E = Cross-Complainant; F = Cross-Defendant; G = Intervenor; U = Real Party in Interest **Indicate Parties Appearing by Inserting "X".

☒ Motion ☐ Demurrer ☐ Petition ☐ Order to Show Cause ☐ Application ☐

of *** 1 to vacate sister state money judgment

☐ Continued to _____ at _____ m. in Dept. _____.

☐ Granted ☐ Denied ☐ Ordered Off-Calendar ☒ Taken Under Submission ☐ With ☐ Without Prejudice

COURT FINDS AND/OR ORDERS:

A. ☐ Trial date of _____ ☐ to remain;
☐ vacated and case set for trial on _____, at 9:00 a.m. in Dept. 1.
☐ Trial Setting Conference set for _____ at _____ m. in Dept. 1.
☐ Estimated time of trial _____ days.
☐ Jury ☐ not requested ☐ requested by*** _____.
☐ Jury fees ☐deposited 14 days prior to trial; ☐ forfeited; ☐ carried forward; ☐ refunded to*** _____
☐ Notice waived; ☐ Notice to be given by*** _____.

B. ☐ Further answers to ☐ interrogatories ☐ requests for admissions _____ within _____ days.
☐ Sanctions paid by*** _____ to*** _____ in amount of _____ payable _____.
☐ Physical examination ☐ inspection and production of documents on _____ at _____ m. at _____.

☐ Matter dismissed conditionally; dismissal may be vacated if answers are filed and served and sanctions paid within _____ days.
☐ Writ to issue.

C. ☐ Sustained as to _____ causes of action.
☐ _____ days ☐ without leave ☐ to amend.
☐ Overruled as to _____ causes of action.
☐ _____ days ☐ without leave ☐ to answer.
☐ Stipulation approved and made order of Court.
☐ Bond of $ _____ to be posted by _____.
☐ Judgment Debtor sworn for examination.
☐ Notice waived; ☐ Notice to be given by *** _____.
☐ Temporary Restraining Order to remain in effect until continuance date.

***Indicate party by inserting number appearing to left of Attorney's name.

☒ This matterhaving been taken under submission earlier this date, the Court now rules as follows: Motion to vacate sister state money judgment denied.

App'v

STATISTICAL CODE USE ONLY	1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.

F0182-431.1

LAW AND MOTION MINUTE ORDER

Make B6

FILED

NOV 21 1978

CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIFORNIA
BY DEPUTY

ENTERED

NOV 21 1978

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

R. KEITH PIKE, et al.,

Plaintiffs.

vs.

LYLE H. PRENZLER, et al.,

Defendants.

No. CV78-3702

ORDER

Apr 3

IT IS HEREBY ORDERED that, pursuant to 28 U.S.C. §§ 1441(b) and 1447(c), this action is remanded to the Superior Court of the State of California for the County of Orange.

Dated: November 20, 1978

/s/ Robert M. Takasugi

ROBERT M. TAKASUGI
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. KEITH, et al.,

Plaintiffs/Appellees,

vs.

LYLE H. PRENZLER,

Defendant/Appellant.

No. 79-3082

D.C. #CV78-3702 RMT
CENTRAL CALIFORNIA

ORDER

FILED

APR 25 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Before: SNEED and ALARCON, Circuit Judges.

Upon due consideration, appellant's petition for rehearing is denied.

App 5

LYLE H. PRENZLER
715 East Chapman Avenue
Orange, California 92666
714 639 1701

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April 30 1980

FILED 4/30/80 jm
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UNITED STATES COURT OF APPEALS NINTH CIRCUIT

R. KEITH PIKE, et al.,
Plaintiffs, Appellees,
vs.
LYLE H. PRENZLER,
Defendant, Appellant,

VERA KAMRATH, et al.,
Cross-Defendant, Appellees

CASE NO. 79-3082

NOTICE OF APPEAL

Acc 6

Lyle H. Prenzler, appellant, hereby appeals the Order April 25, 1980 above Cause for failure to consolidate and joinder parties and actions and denial of equal protection of the laws as a co-conspirator with a class of co-conspirators so conspiring, and failure to provide injunctive relief or inature of injunctive relief, and for acts repugnant to U.S. Constitution TO U.S. SUPREME COURT.

Dated: April 28, 1980

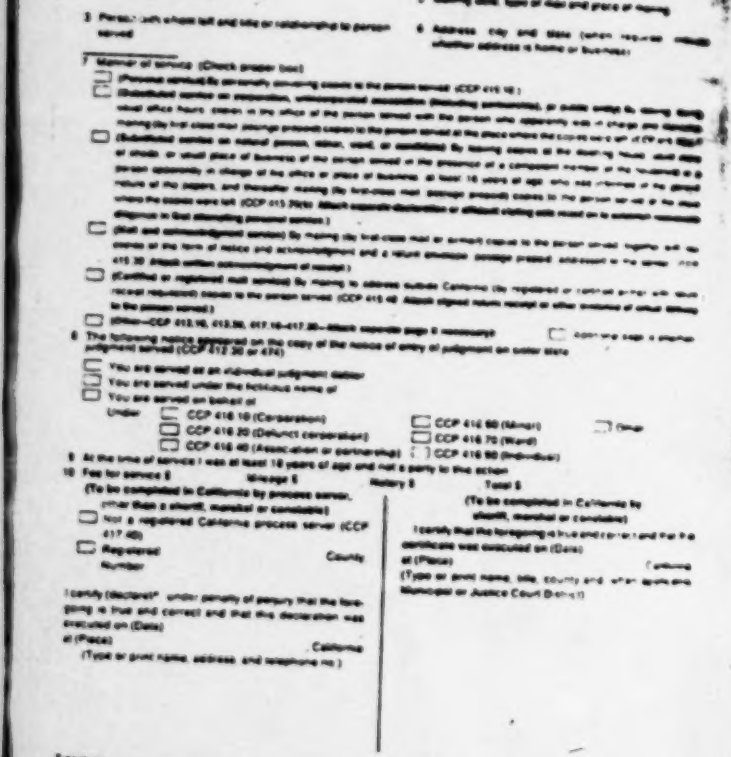
LYLE H. PRENZLER PRO SE

COPIES TO MARK RAYNES
HIGGS FLETCHER MACK
1800 HOME TOWER
707 S. BROADWAY
SAN DIEGO CA, 90112

copy pend

Lyle H. Prenzler, we are unable to certify this copy of the Notice of Appeal as it is not the original. The original copy is filed at the District Court.

Richard H. Deane, Clerk
U.S. Court of Appeals



PROOF OF SERVICE

Law Revision Commission Comment
1974 Addition

Section 1710.30 requires the judgment creditor to serve notice of entry of judgment promptly. In proceedings under this chapter, the court clerk does not send notice of entry of judgment as provided in Section 664.5.

Ordinarily, service of notice of entry of judgment must be made at least 20 days before a writ of execution may issue. See Section 1710.40(a) and Comment. However, in certain circumstances, the judgment debtor may be served with a writ of execution before he is served with notice of entry of judgment. See Section 1710.40(b), and Comment. See also Code Civ. Proc. § 682.1 (service of writ on judgment debtor).

1977 Amendment

Subdivision (b) is added to Section 1710.- to provide the manner of recovering the cost of serving the notice of entry of judgment on the judgment debtor. The cost is to be paid in the same manner as for example, the statutory fee for the service of a writ of execution under Section 1689.7. See Govt.Code § 26721 (basic fee for service of a notice).

1977 Amendment. Added subd. (b).

Library References
Recommendations relating to sister state money judgments, 12 Cal.L.Rev.Comm.Reports 1669 (1974).

§ 1710.35 Effect of entry; enforcement

Except as otherwise provided in this chapter, a judgment entered pursuant to this chapter shall have the same effect as a money judgment of a superior court of this state and may be enforced or satisfied in like manner.

(Added by Stats.1974, c. 211, p. 407, § 3.)

Law Revision Commission Comment
1974 Addition

Section 1710.35 provides that a judgment entered pursuant to this chapter is to be treated as a judgment of the superior court for purposes of enforcement. Hence, for example, the provisions of this code regarding judgment liens (Section 674), execution (Sections 681-713¼), and supplementary proceedings (Sections 714-723) apply to the judgment. However, some variations between the enforcement procedures of this chapter and those generally applicable (see, e.g., Section 1710.45. A judgment entered pursuant to this chapter may be enforced after 10 years as provided by Section 685. Likewise, an action may be brought upon a judgment entered pursuant to this chapter. *Cf.* Thomas v. Thomas, 14 Cal.2d 365, 94 P.2d 810 (1939); Atkinson v. Adkins, 92 Cal.App. 424, 268 P. 461 (1928). However, the same sister state judgment may not serve as the basis for entry of more than one California judgment. See Sections 1710.55(b), (c), 1710.60, and the Comments thereto.

§ 1710.40 Vacation of judgment; motion; entry of another and different judgment, filing

(a) A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment, including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to this chapter is incorrect.

(b) Not later than 30 days after service of notice of entry of judgment pursuant to Section 1710.30, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2, the judgment debtor, on written notice to the judgment creditor, may make a motion to vacate the judgment under this section.

(c) Upon the hearing of the motion to vacate the judgment under this section, the judgment may be vacated upon any ground provided in subdivision (a) and another and different judgment entered, including, but not limited to, another and different judgment for the judgment creditor if the decision of the court is that the judgment creditor is entitled to such different judgment. The decision of the court on the motion to vacate the judgment shall be given and filed with the clerk of court in the manner provided in Sections 632, 634, and 635, except that the court is not required to make any written findings and conclusions if the amount of the judgment as entered under Section 1710.25 does not exceed ten thousand dollars ($10,000).

(Added by Stats.1974, c. 211, p. 407, § 3. Amended by Stats.1977, c. 232, p. —, § 4.)

Law Revision Commission Comment
1974 Addition

Section 1710.40 allows the judgment debtor to make a noticed motion to vacate the entry of judgment on any ground which would be a defense to an action in this state on the sister state judgment. Common defenses to enforcement of a sister

state judgment include the following: the judgment is not final and unconditional (where finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated); the judgment was obtained by extrinsic fraud; the judgment was rendered in excess of jurisdiction; the judgment is not enforceable in the state of rendition; the plaintiff is guilty of misconduct; the judgment has already been paid; suit on the judgment is barred by the statute of limitations in the state where enforcement is sought. See 5B Witkin, California Procedure Enforcement of Judgment §§ 194-196 at 3549-3550 (2d ed. 1971); Restatement (Second) of Conflict of Laws §§ 102-121 (1971).

Where it appears that a writ of execution may be issued or levied before the 10-day notice of motion period specified in Section 1005 has run, the court may either shorten the time of notice under Section 1005 or grant a stay of enforcement under Section 1710.50 in order to prevent execution before the judgment debtor's motion can be heard. Equitable relief from the judgment may be available in certain circumstances after the time for making a motion to vacate has expired. See 5 B. Witkin, California Procedure Attack on Judgment in Trial Court § 175 at 3744-3745 (2d ed. 1971); Restatement of Judgments §§ 112-120 (1942).

Legislative Committee Comment—Senate
1977 Amendment

Subdivision (a) of Section 1710.40 is amended to make clear that the judgment debtor may seek to have the judgment entered in California vacated on the ground that the amount of interest allowed on the sister state judgment is incorrect.

Subdivision (c) is new. The first sentence of subdivision (c) makes clear that the court may enter a different judgment in appropriate cases, e. g., where the principal amount of the judgment or the interest thereon has been incorrectly stated but it is clear that the judgment creditor is entitled to a judgment in California in a different amount. Compare Section 663.

The second sentence of subdivision (c) makes clear that the court must make findings if findings are requested unless the judgment as entered in California is for $1,000 or less. The $1,000 or less exclusion is drawn from the comparable exclusion found in Section 632.

1977 Amendment. Included interest provision in subd. (a); and added subd. (c).

Library References

Recommendations relating to enforcement of sister state money judgments. 11 Cal.L.Rev.Comm.Reports 451 (1973); 13 Cal. L.Rev.Comm.Reports 1 (1975), 1671 (1976) 14 Cal.L.Rev.Comm.Reports 81 (1977).

Recommendations relating to sister state money judgments, 13 Cal.L.Rev.Comm.Reports 1649 (1976), 14 Cal.L.Rev.Comm.Reports 81 (1977).

Index to Notes

In general 1
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Grounds for vacations 2
Res judicata 5
Time 3

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1. In general

Where New York higher education assistance corporation, which had allegedly made an unsecured student loan to maker, obtained New York summary judgment against maker, where New York court had jurisdiction over subject of action and jurisdiction over parties, who both appeared, and where maker, on motion to vacate California judgment enforcing New York judgment, alleged extrinsic fraud in the obtaining of the New York judgment, but maker failed to make any evidentiary showing that he had a meritorious defense to the New York action, it was error to set aside California judgment enforcing New York judgment, despite maker's allegation that necessary process was not served. New York Higher Ed. Assistance Corp. v. Siegel (1975) 124 Cal.Rptr. 208, 51 C.A.3d 684.

Judgment debtor's status as author of allegedly defamatory article instead of publisher did not create legal distinction invalidating South Dakota court's jurisdiction over judgment debtor under long-arm statute. McGuire v. Brightman (1976) 145 Cal. Rptr. 255, 70 C.A.3d 776.

Where judgment debtor wrote story based upon information gathered by him in South Dakota and where judgment debtor's newspaper was sent to small number of subscribers in South Dakota and story was local story of greater interest to residents of South Dakota than to those elsewhere, judgment debtor's purposeful gathering of information in South Dakota and publication of article libeling South Dakota resident, knowing that article would be disseminated in South Dakota, justified South Dakota court's assertion of jurisdiction under South Dakota long-arm statute. Id.

If judgment debtor contests judgment creditor's application for entry of judgment on sister state judgment by making a motion to vacate the judgment, corporate judgment creditor could properly argue against the motion before the court only through an attorney. Tom Thumb Glove Co., Inc. v. Han (1976) 144 Cal.Rptr. 30, 76 C.A.3d 1.

Where plaintiff filed application for entry of judgment based on Texas judgment and where such application was filed within ten years after entry of Texas judgment, special proceeding was not barred by § 337.5, despite fact that clerk of superior court entered judgment in accordance with application more than ten years after entry of Texas judgment. Eppe v. Russell (1976) 133 Cal.Rptr. 20, 62 C.A.3d 201.

2. Grounds for vacation

Because of judgment debtor's default in South Dakota libel action, judgment debtor had right to try jurisdiction issue in California action to enforce South Dakota judgment and to show invalidity of foreign judgment by evidence not before South Dakota court. McGuire v. Brightman (1976) 145 Cal.Rptr. 254, 70 C.A.3d 776.

Fact that defendant was not personally served with notice of entry of judgment pursuant to plaintiff's application for entry of judgment based on previous Texas court judgment until over two months after clerk of superior court entered judgment in accordance with application did not warrant order vacating judgment on ground that notice of entry was not properly served, in view of fact that this section setting forth only statutory ground for motion to vacate did not set forth delay of service as ground supporting motion to vacate and in view of fact that defendant failed to suggest any prejudice to him resulting from the delay. Eppe v. Russell (1976) 133 Cal.Rptr. 20, 62 C.A.3d 201.

3. Time

Defendant's time to move to vacate judgment entered in accordance with application for entry of judgment based on previous Texas court judgment ran from date of service of notice upon defendant, not from date of entry of judgment. Eppe v. Russell (1976) 133 Cal.Rptr. 20, 62 C.A.3d 201.

4. Burden of proof

Evidence in proceeding on judgment creditor's application for entry of judgment on sister state judgment sustained finding that declarations presented by debtor in support of his contention that creditor had obtained sister state judgment against him by extrinsic fraud were insufficient to sustain his burden of showing by preponderance of evidence that he was entitled to relief from judgment entered pursuant to sister state judgment. Tom Thumb Glove Co., Inc. v. Han (1976) 144 Cal.Rptr. 30, 76 C.A.3d 1.

5. Res judicata

Where Nevada court, which entered judgment against attorney in action to recover fee from attorney for appearance made at attorney's request and on behalf of attorney's client, had acquired jurisdiction under both California and Nevada law, and no valid defense was presented to Nevada judgment, such judgment was res judicata as to all issues raised by attorney's motion to vacate clerk's judgment based upon Nevada judgment, including attorney's claim of immunity from service of process. Terrich v. Medak (1976) 144 Cal.Rptr. 323, 76 C.A.3d 636.

§ 1710.45 Writ of execution; resident and nonresident debtors; sale or distribution of property

(a) Except as otherwise provided in this section, a writ of execution on a judgment entered pursuant to this chapter shall not issue until at least 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2.

(b) A writ of execution may be issued before service of the notice of entry of judgment if the judgment debtor is any of the following:

(1) An individual who does not reside in this state.

(2) A foreign corporation not qualified to do business in this state under the provisions of Chapter * * * 21 (commencing with Section * * * 2100) of Division 1 of Title 1 of the Corporations Code.

(3) A foreign partnership which has not filed a statement pursuant to Section 15700 of the Corporations Code designating an agent for service of process.

(c) The court may order that a writ of execution be issued before service of the notice of entry of judgment if the court finds upon an ex parte showing that great or irreparable injury would result to the judgment creditor if issuance of the writ were delayed as provided in subdivision (a).

(d) Property levied upon pursuant to a writ issued under subdivision (b) or (c) shall not be sold or distributed before 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2. However, if property levied upon is perishable, it may be sold in order to prevent its destruction or loss of value, but the proceeds of the sale shall not be distributed to the judgment creditor before the date sale of nonperishable property is permissible.

(Added by Stats.1974, c. 211, p. 407, § 3. Amended by Stats.1976, c. 641, p. 1508, § 1.2, eff. Jan. 1, 1977.)

Law Revision Commission Comment
1974 Addition

Subdivision (a) of Section 1710.45 states the general rule which requires service of the notice of entry of judgment at least 30 days before a writ of execution may be issued. A writ of execution may not be issued under subdivision (a) unless proof of service has been filed which shows that the 30-day requirement has been satisfied. Exceptions to subdivision (a) are stated in subdivisions (b) and (c).

Subdivision (b) permits the issuance and levy of a writ of execution before notice against the assets of three types of nonresident debtors. Subdivision (c) permits issuance of a writ upon an ex parte showing that great or irreparable injury would result if the judgment creditor were required to give notice before obtaining a writ of execution. Although the clerk may issue writs of execution against the debtors described in subdivision (b), the creditor must obtain a court order before a writ of execution may issue under subdivision (c). The clerk may rely on the information in the creditor's application in deciding whether a writ of execution may be issued under subdivision (b). See Section 1710.-15(b)(1).

Subdivision (d) provides a special 30-day delay period which gives the judgment

debtor an opportunity to make a motion to vacate the judgment before his property is sold or distributed. See Section 1710.40.

Section 1710.65 does not otherwise affect the general execution procedures.

1978 Amendment. Substituted, in subd. (b)(2), "Chapter 21 (commencing with Section 2100)" for "Chapter 5 (commencing with Section 680) of Part 11".

1. In general

Plaintiff, who had obtained Texas judgment against defendant for substantial amount of money, had ten years after date on which clerk of superior court entered judgment in accordance with plaintiff's application for entry of judgment based on Texas judgment within which to effect levy on California judgment of that date. Epps v. Russell (1976) 132 Cal.Rptr. 30, 62 C.A. 3d 201.

§ 1710.50 Stay of enforcement

(a) The court shall grant a stay of enforcement where:

(1) An appeal from the sister state judgment is pending or may be taken in the state which originally rendered the judgment. Under this paragraph, enforcement shall be stayed until the proceedings on appeal have been concluded or the time for appeal has expired.

(2) A stay of enforcement of the sister state judgment has been granted in the sister state. Under this paragraph, enforcement shall be stayed until the sister state stay of enforcement expires or is vacated.

(3) The judgment debtor has made a motion to vacate pursuant to Section 1710.40. Under this paragraph, enforcement shall be stayed until the judgment debtor's motion to vacate is determined.

(4) Any other circumstance exists where the interests of justice require a stay of enforcement.

(b) The court may grant a stay of enforcement under this section on its own motion, on ex parte motion, or on noticed motion.

(c) The court shall grant a stay of enforcement under this section on such terms and conditions as are just including but not limited to the following:

(1) The court may require an undertaking in an amount it determines to be just, but the amount of the undertaking shall not exceed double the amount of the judgment creditor's claim.

(2) If a writ of execution has been issued, the court may order that it remain in effect.

(3) If property of the judgment debtor has been levied upon under a writ of execution, the court may order the levying officer to retain possession of the property capable of physical possession and to maintain the levy on other property.

(Added by Stats.1974, c. 211, p. 408, § 3.)

Law Revision Commission Comment
1974 Addition

Section 1710.50 gives broad discretion to the court to grant a stay of enforcement in the interests of justice. Where the court has adequate information, it may grant the stay on its own motion. Otherwise, the burden is on the judgment debtor to show a need for the stay on ex parte or noticed motion. Subdivision (c) gives the court broad discretion in fashioning the terms of the stay in order to adequately protect the interests of both the judgment creditor and the judgment debtor. Whether an undertaking is to be required, and the amount of the undertaking if one is required, is left to the discretion of the court which may consider factors such as whether (1) a successful defense is probable, (2) it is likely that the debtor will conceal or transfer his assets, (3) the debtor has already given a bond on appeal in the sister state, and (4) the debtor prefers having his property held subject to levy rather than giving an undertaking.

§ 1710.55 Restrictions on entry of judgment

No judgment based on a sister state judgment may be entered pursuant to this chapter in any of the following cases:

(a) A stay of enforcement of the sister state judgment is currently in effect in the sister state.

(b) An action based on the sister state judgment is currently pending in any court in this state.

(c) A judgment based on the sister state judgment has previously been entered in any proceeding in this state.

(Added by Stats.1974, c. 211, p. 408, § 3.)

Law Revision Commission Comment
1974 Addition

Subdivision (a) of Section 1710.55 prevents the judgment creditor from using the procedures of this chapter to obtain the entry of a judgment based on a sister state judgment where enforcement has been stayed in the sister state. If entry of judgment is obtained in this state before the stay of enforcement of the sister state judgment is granted in the sister state, the judgment debtor may seek to stay enforcement of the California judgment under Section 1710.50(a)(2).

Subdivisions (b) and (c) of Section 1710.55, together with subdivision (b) of Section 1710.50, preclude a judgment creditor from using his sister state judgment as defined in Section 1710.10(c) as the basis for more than one California judgment.

§ 1710.60 Right of action to enforce judgment; exception

(a) Except as provided in subdivision (b), nothing in this chapter affects any right a judgment creditor may have to bring an action to enforce a sister state judgment.

(b) No action to enforce a sister state judgment may be brought where a judgment based on such sister state judgment has previously been entered pursuant to this chapter.

(Added by Stats.1974, c. 211, p. 408, § 3.)

Law Revision Commission Comment
1974 Addition

Subdivision (a) of Section 1710.60 is similar to Section 6 of the revised Uniform Enforcement of Foreign Judgments Act of 1964. 9A Uniform Laws Ann. 489 (1965). The enactment of this chapter is not intended to restrict the traditional method of enforcing a sister state money judgment which requires the judgment creditor to bring an independent action in this state. See 6 H. Witkin, California Procedure Enforcement of Judgment § 193 at 3542-3549 (2d ed. 1970); Restatement (Second) of Conflict of Laws §§ 99, 100, Comment b (1971); Restatement of Judgments § 47, Comment e (1942). However, subdivision (b) makes clear that the judgment creditor must choose between the methods of enforcement offered. He may not obtain two money judgments in this state based on one sister state judgment as defined in Section 1710.10(c) by using the two different procedures. See also Section 1710.55(b).

§ 1710.65 Right of action for other than payment of money

The entry of a judgment based on a sister state judgment pursuant to this chapter does not limit the right of the judgment creditor to bring an action based on the part of a judgment of a sister state which does not require the payment of money, nor does the bringing of such an action limit the right of the judgment creditor to obtain entry of judgment based on the sister state judgment pursuant to this chapter.

(Added by Stats.1974, c. 211, p. 408, § 3.)

Law Revision Commission Comment
1974 Addition

Section 1710.65 makes it clear that the enforcement of the part of a judgment of a sister state ordering the payment of money pursuant to this chapter is independent of any action on the part of such judgment awarding some other relief and that use of the two separate procedures is not to be regarded as splitting a single cause of action.

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

Sec.
1441. Actions removable generally.
1442. Federal officers sued or prosecuted.
1442a. Members of armed forces sued or prosecuted.
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§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

As amended Oct. 21, 1976, Pub.L. 94-583, § 6, 90 Stat. 2898.

§ 1442. Federal officers sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a non-resident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

§ 1442a. Members of armed forces sued or prosecuted

A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause. Added Aug. 10, 1956, c. 1041, § 19(a), 70A Stat. 626.

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

§ 1444. Foreclosure action against United States

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United

States to the district court of the United States for the ... division in which the action is pending. As amended May 24, 1949, c. 139, § 82, 63 Stat. 101.

§ 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receiver or trustees, arising under sections 51–60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 20 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $3,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States. As amended July 25, 1958, Pub.L. 85–554, § 5, 72 Stat. 415.

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all ad-

(f) If the defendant or defendants ... ess issued by the State court, the district court shall ... of habeas corpus, and the marshal shall thereupon ... fendant or defendants into his custody and deliver ... writ to the clerk of such State court. As amended ... 139, § 83, 63 Stat. 101; Sept. 29, 1965, Pub.L. 89–215

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§ 1447. Procedure after removal generally

(a) In any case removed from a State court, ... may issue all necessary orders and process to ... proper parties whether served by process issued ... or otherwise.

(b) It may require the petitioner to file with its cle... all records and proceedings in such State court or may cause ... same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case ... was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. As amended May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, Pub.L. 88–352, Title IX, § 901, 78 Stat. 266.

§ 1448. Process after removal

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case.

§ 1449. State court record supplied

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver

Note 43

In suit for personal injuries, where no evidence was introduced in support of cause of action for damage to motorcycle, and same was dismissed before case was submitted, defendant could not be prejudiced by overruling of his demurrer, although causes of action were improperly joined under this section. Logan v. Lewis (1915) 170 P. 951, 35 C.A. 662.

Where a party, entitled to bring a single action to recover a specified sum, brought two actions therefor, and defendant made no objection thereto and the judgments rendered in the two actions were correct in amount and within the limits of the liability of defendant, the judgments would not be disturbed. J. F. Hall-Martin Co. v. Hughes (1912) 122 P. 517, 18 C.A. 513.

Where a cause of action for breach of contract in one count was improperly joined with another count on a cause of action founded on tort, prejudice would be presumed, since such joinder was expressly forbidden by this section, and it did not affirmatively appear that no injury was done thereby. Stark v. Wellman (1892) 21 P. 253, 86 C. 400.

Whether or not a cause of action to quiet title was improperly joined with one against a trustee of real estate having no beneficial interest, if the plaintiff was entitled to a conveyance from the trustee, and the trustee could have recovered from the other defendant in the cause of action to quiet title, the substantial rights of the parties were not affected, and judgment would not be reversed for such error. Reynolds v. Lincoln (1956) 12 P. 449, 71 C. 163.

Article 4

CROSS-COMPLAINTS

Sec.

428.10 Filing of cross-complaint; causes of action.
428.20 Joinder of person as cross-party.
428.30 Joinder of other causes of action by cross-complaint.
428.40 Separate document.
428.50 Filing of cross-complaint; leave of court.
428.60 Service; appearance.
428.70 Definitions.
428.80 Abolition of counterclaims.

Article 4 was added by Stats.1971, c. 244, p. 380, § 23, operative July 1, 1972.

Historical Note

Operative date of 1971 addition and applicability of Article 4 to actions commenced on or after July 1, 1972, see, Historical Note under § 117h.

§ 428.10 Filing of cross-complaint; causes of action

A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him.

(Added by Stats.1971, c. 244, p. 380, § 23, operative July 1, 1972.)

Legislative Committee Comment—Assembly

1971 Addition

Section 428.10 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. It should be noted that, if the cause arises out of the same transaction or occurrence, the cross-complaint is compulsory. See Section 426.30. Counterclaims have been abolished. Section 428.60.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. *E. g.*, Fed.R.Civ.Proc. Rule 13. Third persons may be joined pursuant to Section 428.20.

Subdivision (b) does not, of course, limit the right of a party against whom a cause of action has been asserted to join unrelated causes of action when filing a cross-complaint under subdivision (a) against the party who asserted the cause against him. Subdivisions (a) and (b) are completely independent provisions, and it is necessary only that the person seeking to file the cross-complaint come within the provisions of one of the subdivisions.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under prior law, some causes which a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party. For discussion of the prior law, see the Comment to Section 426.30 and Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan.L.Rev. 1, 19–23 (1970).

Subdivision (b) continues the rule (former Code of Civil Procedure Section 442) that a cross-complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence or involves the same property or controversy (see, discussion in Comments to sections 378, 379, and 426.10). Subdivision (b) thus permits a party to assert a cause of action against a person who is not already a party to the action if the cause has a subject matter connection with the cause already asserted in the action. For further discussion, see Friedenthal, *supra*, at 25-26.

Section 428.10 restricts cross-complaints in eminent domain actions to those that assert a cause of action arising out of the same transaction or occurrence or that involve the same property or controversy. Subdivision (a) which permits assertion of unrelated causes of action is made specifically inapplicable to eminent domain actions; but subdivision (b), which permits assertion of related causes, is applicable.

Any undesirable effects that might result from joinder of causes under Section 428.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

Historical Note

Derivation: Former section 427, enacted 1872, amended by Stats.1907, c. 272, p. 505, § 2; Stats.1913, c. 135, p. 219, § 1; Stats.1915, c. 28, p. 30, § 1; Stats.1931, c. 324, p. 695, § 1; Stats.1961, c. 559, p. 1736, § 8.

Former section 426, enacted 1872, amended by Stats.1927, c. 813, p. 1629, § 1.

Former section 441, enacted 1872.

Former section 442, added by Code Am. 1873-74, c. 383, p. 331, § 54, amended by Stats.1907, c. 372, p. 705, § 6; Stats.1909, c. 629, p. 966, § 1; Stats.1915, c. 141, p. 298, § 1; Stats.1923, c. 376, p. 756, § 1.

Stats.1851, c. 5, pp. 57 to 59, §§ 47, 49, 64; Stats.1856, c. 155, p. 196; Stats.1859, c. 314, p. 298.

Cross References

Applicability of procedural provisions to all trial courts, exceptions, see § 34.
Cross-complaint beyond jurisdiction, transfer of case, see § 396.
Cross-demands, see § 431.70.
Dismissal where there is a cross-complaint, see § 581.
Divorce, residence of cross-complainant, see Civil Code § 4530.
Effect of failure to set up cross-complaint, see § 426.30.
Judgment on cross-complaint exceeding plaintiff's demand, see § 600.
Justice court, cross-complaint in, see § 422.20.
New matter in answer deemed controverted, see § 431.20.
Permitted pleadings, see § 422.10.
Requisites of original complaint, see § 422.30 et seq.
Trial of special defenses pleaded in answer to cross-complaint, see § 597.

Law Review Commentaries

Action by third party beneficiary, right of promisor to set-off or counterclaim demands against the promisee. (1935) 27 C.L.R. 497, 525.

Appealability of order striking cross-complaint. (1963) 15 Hastings L.J. 111.

Automatic setoff of cross demands under statute. (1964) 42 C.L.R. 197.

Bank's right to setoff against a debt secured by realty—is it a bird in the hand or a bird in the bush? Robert J. Breakstone (1968) 44 Los Angeles Bar Bull. 249.

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Counterclaim: filing against non-resident. 4 U.C.L.A Law Rev. 271. (1957).

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Counterclaims for personal injury and property damage resulting from a single act. (1934) 23 C.L.R. 191.

Courts having jurisdiction of cross-demands. (1941) 29 C.L.R. 762.

Cross-demands: California procedure and the Federal Rules. (1956) 1 U.C.L.A. Law R. 547.

Demurrer to cross-complaint. (1939) 13 So.Cal.L.R. 6.

Distinctions between and overlapping of counterclaims and cross-complaints. (1950) 3 Stan.L.R. 99.

Effect of a statute of limitations upon the right to assert a counterclaim. (1961) 31 C.L.R. 210.

Equitable defenses in law actions in federal courts. (1929) 17 C.L.R. 591.

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Joinder of actions with special reference to the Montana and California practice. (1930) 18 C.L.R. 459.

Judgments subject to set-off. (1922) 10 C.L.R. 422, 424.

Necessity of cross-complaint and effect of unnecessary cross-complaint. (1913) 1 C.L.R. 82.

Problems encountered in permitting excessive attachment victim to recover in cross-action for abuse of process, as opposed to separate, subsequent action for malicious prosecution. (Fall 1968) 9 Santa Clara Lawyer 122.

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Right to assert counterclaims for personal injuries and property damage resulting from a single act. (1931) 20 C.L.R. 191.

Scope of statutory provisions for pleading counterclaims. (1928) 16 C.L.R. 363, 365.

Set-off against insolvent bank. (1933) 6 So.Cal.L.R. 232.

Set-off and counterclaim in mortgage foreclosure action. (1937) 25 C.L.R. 347, 352.

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Tendency to diminish or defeat plaintiff's recovery as basis for counterclaim. (1930) 18 C.L.R. 453, 475.

Transactional cross-complaints. William A. Masterson (1968) 35 Los Angeles Bar Bull. 249.

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...presence. Atherley v. MacDonald, ... & Nelson, Inc. (1955) 297 P.2d 529, ... C.A.2d 323.

...Under proper circumstances, relief may ...sought by the filing of a cross-complaint ...a claim and delivery action, and new ...parties may be brought in under a cross-...complaint where it appears that their presence ...is essential to the complete determination of the controversy already before the court. Spencer Kennelly, Limited, v. Bank of America Nat. Trust & Sav. Ass'n (1946) 122 P.2d 552, 19 C.2d 385.

A new party not necessary to the decision of the matter before the court could not be brought into a case by a cross-complaint authorized by former § 442. Heed v. Wing (1914) 144 P. 344, 168 C. 706.

Under former § 442, a defendant could not introduce new parties by way of cross-complaint. Clark v. Kelley (1912) 124 P. 846, 163 C. 207.

Under former § 442, defendant properly could join third person with plaintiff as a party defendant to the cross-complaint. Goodell v. Verdugo Cañon Water Co. (1903) 71 P. 334, 138 C. 308.

New parties may be brought in by defendant on a cross bill, if the cause of action to which they are made parties defendant is the proper subject of a cross complaint. Stockton Savings & Loan Soc. v. Harrold (1900) 60 P. 165, 127 C. 612.

§ 428.30 Joinder of other causes of action by cross-complainant

Where a person files a cross-complaint as authorized by Section 428.10, he may unite with the cause of action asserted in the cross-complaint any other causes of action he has against any of the cross-defendants, other than the plaintiff in an eminent domain proceeding, whether or not such cross-defendant is already a party to the action.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

Legislative Committee Comment—Assembly

1971 Addition

Section 428.30 provides permissive joinder rules that treat a cross-complaint generally the same as a complaint in an independent action. *Cf.* Section 427.10. Thus, with a single exception, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against any of the cross-defendants. See the Comment to Section 427.10. The exception is the filing of a cross-complaint against the plaintiff in an eminent domain action. In such a case, the cross-complaint may state only those causes of action which arise out of the same transaction or occurrence or involve the same property or controversy. See Section 428.10. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes or issues for trial under Section 1048.

Law Review Commentaries

Comparison of the cross-complaint and the counterclaim in California. (1950) 3 Stan.L.R. 99.

Courts having jurisdiction of cross-demands. (1951) 29 C.L.R. 766.

Cross-demands: California procedure and the Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

Library References

§ 428.40 Separate document

The cross-complaint shall be a separate document.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

Law Revision Commission Comment

1971 Addition

Section 428.40 requires the cross-complaint to be a separate document. Under prior practice, a counterclaim could be a part of the answer. However, the counterclaim is now abolished. See Section 428.80.

Law Review Commentaries

Counterclaims, cross-complaints, and confusion. (1950) 3 Stanford L.R. 99.

Cross-demands: California procedure and Federal Rules. (1954) 1 U.C.L.A. Law R. 547.

Library References

Pleading ⇐147.

C.J.S. Pleading § 174.

Notes of Decisions

1. In general

Cross-complaint is pleading separate and ... not be aided by averments of answer, apart from answer, and is required to ... Lease ... Rivers (1921) 28 P.2d 337, 219 C. ... complete and sufficient in itself, and con... 626.

§ 428.50 Filing of cross-complaint; leave of court

A party shall obtain leave of court to file any cross-complaint except one filed before or at the same time as his answer to the complaint or cross-complaint. Such leave may be granted in the interest of justice at any time during the course of the action.

(Added by Stats.1971, c. 244, p. 381, § 23, operative July 1, 1972.)

Legislative Committee Comment—Senate

1971 Addition

The first sentence of Section 428.50 continues the substance of a portion of former Code of Civil Procedure Section 442 except that it makes clear that a cross-complaint may be filed "before" as well as at the same time as the answer. As under former Section 442, permission of the court is required to file a cross-complaint subsequent to the answer. The language "may be granted" of Section 428.50 places the question of leave to file a cross-complaint after the answer wholly in the discretion of the court; it is to be distinguished from the mandatory language "shall grant" of Section 426.50 relating to compulsory cross-complaints.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 29 1979
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

R. KEITH PIKE, et al.,

Plaintiffs-Appellees,

vs.

LYLE H. PRENZLER,

Defendant-Appellant.

No. 79-3082

D.C. # 78-3702
Central Calif.

ORDER

Apr'd

Upon due consideration, the record, heretofore received, is ordered filed. This order is subject to recnsideration by a judge if any opposition is filed within ten (10) days of the en ry of the order.

Beth L. Levine
Motions Attorney/Deputy Clerk
Local Rule 22

MA 3/28/79

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. KEITH, et al.,

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DC# CV 78-3702 RMT
Central California

ORDER

FILED

FEB 25 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Before: SNEED and ALARCON, Circuit Judges

Upon due consideration, this appeal is dismissed for lack of jurisdiction under 28 U.S.C. 1447(d). With few exceptions not applicable here, an order remanding an action to the state court from which it was removed is not reviewable on appeal or otherwise. See Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 345-52 (1976); Tolefree v. Ford Motor Credit Co., 571 F.2d 1088 (9th Cir. 1977).

Mo Cal 2/19/80